



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), VISRAM & WARSAME, JJ.A)

CRIMINAL APPEAL NO 29 OF 2015

BETWEEN

SAMUEL KUNGU KAMAU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High court of Kenya at Nairobi (Ngugi & Achode, JJ) dated 11th December 2013

in

H.C.Cr. A No 52 of 2011)

RULING OF THE COURT

Rule 29 (1)(b) of the Court of Appeal Rules gives this Court the power to take additional evidence, or to direct that additional evidence be taken by a trial court. This is an exercise in discretion, meaning that parties must give the Court sufficient reason to allow an application to take additional evidence.

The power of the court to take additional evidence has been adjudicated upon in several decisions. In *Karmali Tarmohamed & Anor. Vs. I.H.Lakhani [1958] EA 567* the predecessor to this Court held that:

1“(i) *except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence, unless it was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available.*”

In *The Administrator, HH The Aga Khan Platinum Jubilee Hospital v Munyambu [1985] KLR 127* it was held that: -

“1. *In exercising its discretion to grant leave to adduce additional evidence under rule 29*

(1) (b) of the Court of Appeal Rules, the Court of Appeal will generally give such leave if the evidence sought to be adduced could not, with reasonable diligence, have been obtained for use at the trial, if it will probably have an important influence on the result of the appeal, and is apparently credible

though it need not be incontrovertible. Such evidence will be admitted if some assumption basic to both sides has been clearly falsified by subsequent events and where to refuse the application would affront common sense or a sense of justice.”

In the case of Wanje v Saikwa [1984] KLR 275 this Court held inter alia as follows:-

“1. Before the Court of Appeal will permit additional evidence to be adduced under rule 29 it must be shown that it could not have been obtained by reasonable diligence before and during the hearing.

2. It must also be shown that the new evidence would have been likely to have affected the result of the suit.”

That authority was quoted with approval by this Court in Judith Deborah Cave Shaw v Francis Robert Shaw, Civil Application No. NAI. 361 of 2005 (unreported) where it was held that:

“... before this Court gives leave to a party to call additional evidence under Rule 29 it must be shown that the evidence sought to be introduced could not have been obtained by reasonable diligence before or during the hearing of the suit in the superior court, and secondly, it must be shown that the new evidence sought to be introduced would have been likely to affect the result of the suit.”

And as was stated by this Court in Joginder Auto Service Ltd v Mohammed Shaffique & Another [2001] eKLR (Civil Appeal (Application) No. Nai. 210 of 2000)

“Rule 29(1)(b), of the Rules does not set out what constitutes sufficient reason. But this Court and other courts in different common law jurisdictions have, over the years, enunciated principles to guide the courts in applications for leave to adduce additional evidence.... In summary these and several other cases decided that the power of the court and more particularly this Court, to receive further evidence is discretionary, which discretion is exercised on three broad principles, namely:

(1)The applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.

(2)The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and

(3)The evidence must be apparently credible, although it need not be incontrovertible.

These are general principles, but we cannot say that they are the only ones. The relevant rule authorising the adduction of additional evidence uses a general phrase, namely,

"sufficient reason."”

The matters that this Court takes into consideration when considering whether or not additional evidence in criminal appeals are also well established. In addition to those that have been cited above, this Court in Brown Tunje Ndago v Republic [2013] eKLR (Criminal Appeal (Application) No. 12 of 2012) held that:

“This Court has jurisdiction to admit additional evidence only where there is a pending appeal in this Court from a decision of the superior court in its original jurisdiction such as where the superior court has convicted a person for murder or treason. In other words, this Court will only be seized of jurisdiction to entertain the application in situations which it is acting as a first appellate court from the decision of the superior court.”

The applicant herein has invoked Rule 29 (1)(b) of this Court’s rules, as well as Sections 3A and 3B of the Appellate Jurisdiction Act to seek orders that:

1. The OCS Githurai Kimbo Police Station, Nairobi do give the applicant or his representative a

certified photocopy of the occurrence book dated 15th November 2009 in which the first report to the police by Mary Wangui Muchira was recorded which led to the arrest of the applicant on 16th November 2011 as recorded in OB No 45/16/11/09 and subsequent prosecution in criminal case no 4705 of 2009 in the Chief Magistrate's

Court at Makadara;

- 2. The applicant be granted leave by this Honourable Court to adduce as further evidence in this appeal, the first report of the complainant.***

The background against which the applicant seeks these orders is fairly straight forward. He was convicted of the offence of robbery with violence and sentenced to death. He unsuccessfully appealed against that conviction and sentence to the High Court, and he has now appealed to this Court raising various grounds of appeal. Among them is that his identification as one of the robbers was improper. At this stage, he seeks to introduce into evidence the occurrence book of the Githurai Kimbo Police Station dated 15th November 2009, which has a record of the first report of the crime by the complainant, which he says is critical to the success of his appeal.

From the authorities that we have cited herein above, one fundamental consideration whether or not to allow such an application is whether such evidence was available, easily procured and within the knowledge of the person so seeking to admit it into evidence. As has been conceded by the applicant, he never sought to introduce this evidence either during trial or during the first appeal, yet there is nothing to suggest that it was not available all along. Counsel for the applicant states that the applicant ***'being a layman did not ask of the production of the said evidence'*** during trial and during the appeal. We do not think that this is enough reason for us to allow this evidence to be called. It has been said time and again that the unfettered power of the Court to receive additional evidence should always be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal. In the words of Chesoni Ag JA (as he then was) in ***Wanjie v Saikwa (supra)***

“This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the Rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.”

The second fundamental issue to consider is that this is a second appeal, where by virtue of section 361 of the Criminal Procedure Code, our jurisdiction is limited to the consideration of issues of law only.

In the present application, the applicant has challenged his conviction based on the first report of the complainant to the police. The applicant avers that the evidence of the first description of the applicant by the complainant to the police was not adduced at the trial, and the applicant, being unrepresented at the time, did not ask for the production of the evidence during hearing of the first appellate court. The applicant contends that this, being his last chance to secure freedom, he should be allowed to produce further evidence that he terms as crucial in the appeal. Rule 29 gives this court power to receive additional evidence when it is sitting on ***any appeal from a decision of a superior court acting in the exercise of its original jurisdiction***. Thus, in a second appeal, this Court does not have the jurisdiction to order the taking of additional evidence. In ***Marcarios Itugu Kanyoni v Republic [2011] eKLR (Criminal Application No. 5 of 2011)*** the court went on to consider the application on merit, but stated that:

“The provisions of Rule 29 (1) are plain This Court has jurisdiction to take additional evidence only when it is dealing with a first appeal from the conviction by the High Court. The Legislature could not have intended that a second appellate court which deals with appeals on points of law only

should have jurisdiction to take additional evidence which generally deals with matters of fact. It is the High Court sitting as a first appellate court over the applicant's appeal which had jurisdiction to take additional evidence. The applicant did not invoke the jurisdiction of the superior court. From the foregoing, we make a definite finding that this Court has no jurisdiction to entertain the application."

This proposition of law was also stated in *Daniel Mwathi Njaramba & 2 others v Republic [2013] eKLR (Criminal Appeal (Application) No. 233 of 2012* where the Court rendered itself as follows:

"Based on the foregoing it is clear that this Court can only exercise its power under the said provision to admit additional evidence where it is sitting as a first appellate court from the decision of the High Court in exercise of its original jurisdiction."

We are aware that sections 3A and 3B of the Appellate Jurisdiction Act gives this Court a wide latitude to make orders to ensure the efficient administration of justice. However, such justice must be within the boundaries and the framework of the law; invoking the overriding objects of the Appellate Jurisdiction Act cannot confer on the Court a jurisdiction that it does not have.

In light of what we have stated above, this application is lacking in merit, and we are constrained to order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 6th day of November 2015

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

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